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No. 87-1761

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

AMERICAN PRESIDENT LINES, LTD.,
Petitioner

v.

ZACHRY-DILLINGHAM, A JOINT VENTURE,
Respondent

On Writ of Certiorari to the Court of Appeals for the Fourth Supreme Judicial District San Antonio, Texas

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The only questions are:

(1) whether the Texas intermediate court incorrectly held that the Shipping Act (including the "filed rate doctrine") does not preempt redress (provided by state fraud law and deceptive practice statutes) against a carrier for inducing a shipping commitment by knowingly misrepresenting that the quoted rate would be made effective by filing new tariffs with the Federal Maritime Commission; and

(2) whether the alleged state court action is preempted by general federal maritime law.

LIST OF PARTIES

1. American President Lines, Ltd.
2. Zachry-Dillingham, a Joint Venture.*

* Zachry-Dillingham, a Joint Venture, is composed of H. B. Zachry Company, a Delaware corporation, and Dillingham Construction International, Inc., a Nevada corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI	5
I. Redress for inducing a shipping commitment through fraudulent and statutorily deceptive representations that new tariffs would be filed is properly a matter of state law not preempted by the Shipping Act (including the "filed rate doctrine")	5
A. Since the state law claim is not for misrepresentation of the "proper freight rate to be charged," the lower court's decision is not in conflict with circuit court decisions	5
B. After analyzing the criteria for determining federal preemption, the lower court correctly concluded that Congress did not intend for the Shipping Act's tariff regulation to preempt state law redress for the conduct in question	8
C. The lower court's holding is not contrary to decisions of this Court	11
II. Zachry-Dillingham's state action is not preempted by general maritime law	15
CONCLUSION	16

TABLE OF AUTHORITIES

Cases: Page

Aero Trucking, Inc. v. Regal Tube Co., 594 F.2d 619 (7th Cir. 1979) 6, 9, 10
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981) 12, 14
Askew v. American Waterways Operators, Inc., 411 U.S. 325, 36 L.Ed.2d 280 (1973) 15
Atchison, Topeka & Santa Fe Railway Co. v. Bouziden, 307 F.2d 230 (10th Cir. 1962) 7
Brown v. American Transfer & Storage Co., 601 S.W.2d 931 (Tex.), *cert. denied*, 449 U.S. 1015 (1980) 8, 9, 10
Carnation Co. v. Pacific Westbound Conference, 383 U.S. 213, 15 L.Ed.2d 709 (1966) 12
Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) .. 12, 13
Chick Kam Choo v. Exxon Corp., 817 F.2d 307 (5th Cir.), *cert. granted*, —— U.S. ——, 98 L.Ed.2d 369 (1987) 16
Consolidated Freightways Corp. v. Terry Tuck, Inc., 612 F.2d 465 (9th Cir.), *cert. denied*, 447 U.S. 907 (1980) 7
Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 10 L.Ed.2d 248 (1963) 8
Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Co., 586 F.2d 588 (5th Cir. 1978) 7
Inter-Island Steam Navigation Co. v. Hawaii, 305 U.S. 306, 83 L.Ed. 189 (1938) 12
Keogh v. Chicago and Northwestern Railway Co., 260 U.S. 156 (1922) 12, 13
Missouri Pacific Railroad Co. v. Rutledge Oil Co., 669 F.2d 557 (8th Cir. 1982) 7
Offshore Logistics, Inc. v. Tallentire, 477 U.S. 207, 91 L.Ed.2d 174 (1986) 16
Oil, Chem. & Atomic Workers, Int'l Union v. Mobil Oil Corp., 426 U.S. 407, 48 L.Ed.2d 736 (1976) .. 16
Paulson v. Greyhound Lines, Inc., 804 F.2d 506 (8th Cir. 1986) 7

TABLE OF AUTHORITIES—Continued

	Page
Roco Worldwide, Inc. v. Constellation Navigation, 660 F.2d 992 (4th Cir. 1981)	3
Romero v. International Term. Operating Co., 358 U.S. 354, 3 L.Ed.2d 368 (1959)	15
Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 78 L.Ed.2d 443, (1984)	8
Smith v. Baldwin, 611 S.W.2d 611 (Tex. 1980)	9
Square D Co. v. Niagra Frontier Tariff Bureau, Inc., 467 U.S. 409, 90 L.Ed.2d 413 (1986)	12, 13
United States Navigation Co. v. Cunard S.S. Co., 284 U.S. 474, 76 L.Ed. 408 (1932)	12
Woods v. Littleton, 554 S.W.2d 662 (Tex. 1977)	9
Other Authorities:	
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1257(3)	1
46 U.S.C. § 801, 812-17	9, 13
Tex. Bus. & Com. Code § 17.44	9
Tex. Bus. & Com. Code § 17.46(a)	2
Tex. Bus. & Com. Code § 17.46(b) (5) (7) (9) (11) (12) (14) (19) (23)	2
Tex. Bus. & Com. Code § 17.50(a) (1) (3)	2
Tex. Bus. & Com. Code § 17.50(b) (1)	2
H.R. Rep. No. 53, 98th Cong., *reprinted in* 1984 U.S. Code Cong. and Ad. News 183-84	11

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BRIEF IN OPPOSITION

STATEMENT OF JURISDICTION

Petitioner American President Lines, Ltd. incorrectly cited 28 U.S.C. § 1254(1) as a source of jurisdiction. That statute concerns appeals by writ of certiorari from federal courts of appeal. Jurisdiction is conferred, however, by 28 U.S.C. § 1257(3), which governs review of state court decisions by writ of certiorari.

STATUTORY PROVISIONS INVOLVED

In addition to the Shipping Act of 1916, cited by Petitioner, the following provisions of the Texas Deceptive Trade Practices—Consumer Protection Act (as amended and as in effect in 1982) are involved: Tex. Bus. & Com.

Code § 17.46(a); § 17.46(b)(5), (7), (9), (11), (12), (14), (19), and (23); § 17.50(a)(1) and (3); § 17.50 (b)(1). These statutes are set forth in Appendix A.

STATEMENT OF THE CASE

The lower court's opinion, which is appended to the Petition for Writ of Certiorari, correctly describes this summary judgment case, but Petitioner's Statement of the Case is inaccurate and incomplete. Contrary to Petitioner's opening paragraph, this dispute does not concern misrepresentation of "the freight rate to be charged." Respondent's pertinent liability allegation is that fraud and statutory deception, in the form of Petitioner's knowing misrepresentation that new tariffs would be filed, induced a shipping commitment that otherwise would not have been made. Respondent's other claims of breach of contract and negligence have no role in this review because the lower court resolved them in Petitioner's favor.

For the purpose of constructing a major USAID project, Zachry-Dillingham needed to ship heavy construction equipment and other supplies to Colombo, Sri Lanka. Zachry-Dillingham's retention of a freight forwarder (WTS of Houston, Inc.) to make rate studies led to negotiations with Petitioner American President Lines, Ltd. (hereafter APL). APL made oral and written representations "guaranteeing" that, prior to the time for shipment, APL would file with the Federal Maritime Commission new tariffs necessary to validate the quoted rate. Under the Shipping Act, the new tariffs would have become effective immediately upon publication and filing.

In reliance on those representations, Zachry-Dillingham committed its plans and schedule to ship with APL. Timely arrival of the equipment and supplies in Sri Lanka was critical to Zachry-Dillingham's performance of the USAID contract. As the shipping date approached, APL informed Zachry-Dillingham that the new tariff filing had been delayed but that it would be effective "by

the end of the following week." Nevertheless, APL did not file the new tariffs before shipment or at any time. APL demanded payment of the pre-existing tariff rate when the shipment reached Sri Lanka, and, under protest, Zachry-Dillingham paid the demand in order to meet its construction obligation. The Federal Maritime Commission's District Director later observed that APL's failure to amend the tariffs did not appear to be the result of inadvertence, noting also APL's unwillingness to participate in an administrative waiver proceeding that the Shipping Act authorizes to implement inadvertently late-filed tariff amendments.[1] The Director's decision, on which the United States District Judge partially based the remand to state court, is set out in Appendix B.

In its state court suit, Zachry-Dillingham pleaded, among other things, that it committed the arrangements to ship with APL because of APL's representations guaranteeing a new tariff filing and that APL's misrepresentations to induce that commitment constituted fraud and violation of specified deceptive trade practice statutes. The Texas deceptive trade practice statutes (Appendix A) provide a private remedy in damages for certain knowing deception, misrepresentations, misleading statements concerning price reductions, false advertising and unconscionable conduct.

APL's petition for removal asserted that Zachry-Dillingham's action was based on federal maritime law that was within the exclusive jurisdiction of federal courts. In granting Zachry-Dillingham's motion to remand, the United States District Judge ruled otherwise, emphasizing that the Federal Maritime Commission had previously denied jurisdiction over the controversy. In

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[1] The opinion in *Roco Worldwide, Inc. v. Constellation Navigation*, 660 F.2d 992 (4th Cir. 1981), contains a practical discussion of the utility of the Shipping Act's 180-day post-shipment grace period to correct inadvertent clerical error.

concluding that civil litigation arpeared to be the only recourse, the Commission's Director had noted, prior to the initiation of Zachry-Dillingham's suit, that there did not appear to be a violation of the Shipping Act and that administrative resolution was not appropriate since "no error or inadvertence in filing appears to have occurred and APL is not willing to enter such a proceeding at this time." (Appendix B).

APL's motion for summary judgment in state court was based on the same argument previously urged as the ground for removal. In reversing the trial court's summary judgment that Zachry-Dillingham take nothing, the Texas court of appeals held that the Shipping Act preempted Zachry-Dillingham's alternative theories of breach of contract and negligence but not the fraud and statutory counts:

> The Shipping Act's tariff filing requirements emphasize the rights of shippers. There is no evidence of congressional intent to grant immunity to carriers for their fraudulent acts. The grant of immunity from the Texas DTPA would provide carriers with a shield whose existence is not directly related to the accomplishment of the purpose of the tariff filing requirements. Immunity from the Texas DTPA is not necessary to the accomplishment of any congressional objective expressed by the Shipping Act.
>
> Both the language of the Shipping Act and its legislative history, indicate that it was intended to prevent unfair discrimination against shippers, not to create a defense to unfair competition by carriers. The Shipping Act and the Texas law are complementary. Enforcement of a tariff in circumstances where there is collusion between a shipper and carrier would work to the unfair detriment of the shipper, while enforcement of the Texas law prohibiting fraud and unfair business practices fosters competition by protecting the shipper against unfair business practices of a carrier. 739 S.W.2d 420, 423

(Tex. App. —— San Antonio 1987, writ den'd) (Petition Appendix 7a).

There is neither claim nor indication that Zachry-Dillingham's suit is in furtherance of collusion or a scheme to consummate a rebate of the pre-existing tariff charges.

APL repeatedly characterizes this case as a dispute over the "rate to be charged." That is not the case at all. During negotiations all parties were aware of the pre-existing tariffs; the dispute is over fraudulent statements that new tariffs would be filed. Moreover, since APL did not file the new tariffs, Zachry-Dillingham does not contest its obligation under the "rate filed doctrine" to pay for shipping at the pre-existing rate. This dispute centers on Zachry-Dillingham's claim that APL's fraud and deception, based on APL's guarantee that new tariffs would be filed, caused Zachry-Dillingham to commit to a detrimental shipping situation that, but for the fraud and deception, it would not have done.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I. Redress for inducing a shipping commitment through fraudulent and statutorily deceptive representations that new tariffs would be filed is properly a matter of state law not preempted by the Shipping Act (including the "filed rate doctrine")

A. *Since the state law claim is not for misrepresentation of the "proper freight rate to be charged," the lower court's decision is not in conflict with circuit court decisions.*

APL's unwillingness to acknowledge the controlling feature of Zachry-Dillingham's claim leads to APL's misplaced reliance on purported conflict that does not exist. As the lower court wrote:

> Plaintiff [Zachry-Dillingham] alleged that defendant was guilty of common law fraud by inducing plaintiff to enter into the shipping contract through false representation that (1) it would file new tariffs. . . . Plaintiff also alleged that defendant's misrepresentations constituted a violation of . . . the Texas Deceptive Trade Practices Act. 739 S.W.2d 420, 421 (Tex. App.—San Antonio 1987, writ den'd) (Petition Appendix 3a).

The state law claim in question is obviously not based on mere variance between a quoted "rate to be charged" and applicable tariffs. On the other hand, APL's circuit court decisions (Interstate Commerce Act cases) concerned misrepresentations of the "rate to be charged," which were equivalent to representations that existing tariffs were something other than what they actually were. Because of that paramount distinction, APL's suggestion that a conflict needs resolution has no validity.

In the case cited for direct conflict, *Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619 (7th Cir. 1979), a shipper defended a carrier's suit to collect freight detention tariffs, contending that the carrier should be estopped for having induced the transaction with a fraudulent representation that such charges would not be made. *Id.* at 621. The court properly rejected the defensive contention for the reason indicated in APL's Petition:

> The short answer to this contention is, as it is in all undercharge cases, that the applicable tariffs are by law incorporated into the contract between shipper and carrier. Since the shipper is presumed to have knowledge of the applicable tariff rates, Regal cannot rely on Aero's statement that no detention charges would be assessed.

594 F.2d at 622. The essence of *Aero Trucking*, like the other circuit court decisions clustered on page 6 of APL's Petition, is that the "filed rate doctrine" carries with it constructive knowledge of (and implied agreement to pay

in accordance with) tariffs effective at the time of shipping—regardless of the price the carrier represented and regardless of whether the shipper had actual knowledge of filed tariffs.[2] Clearly, Congress' intent to establish a predictable, non-discriminatory uniform rate structure could never be accomplished if the effective tariff were subject to avoidance at the will of a carrier. Thus, although the results are consistently recognized to be harsh, these circuit courts correctly concluded that enforcement of effective tariffs cannot be defeated (on theories of fraud, estoppel, breach of contract or anything else) by carrier misconduct in representing that the shipping costs would be measured on some basis other than filed tariffs.

The present case is a world apart. Unlike the others, Zachry-Dillingham does not contend that the transaction was induced by representations that non-tariff rates would govern and does not seek to avoid the obligation imposed by filed tariffs, of which it had not only constructive but also actual knowledge. The consequence of APL's existing tariffs was the very focus of Zachry-Dillingham's negotiations with APL, and, indeed, it was misrepresentations that those tariffs would be changed that gave rise to this controversy. None of the decisions

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[2] Four of the circuit cases cited on page 6 of APL's Petition (for supposed indirect conflict) involved similar unsuccessful attempts to defend a carrier's suit to collect tariffs: *Illinois Central Gulf Railroad Co. v. Golden Triangle Wholesale Gas Co.*, 586 F.2d 588 (5th Cir. 1978); *Missouri Pacific Railroad Co. v. Rutledge Oil Co.*, 669 F.2d 557 (8th Cir. 1982); *Consolidated Freightways Corp. v. Terry Tuck, Inc.*, 612 F.2d 465 (9th Cir.), *cert. denied*, 447 U.S. 907 (1980); *Atchison, Topeka & Santa Fe Railway Co. v. Bouziden*, 307 F.2d 230 (10th Cir. 1962). The fifth, *Paulson v. Greyhound Lines, Inc.*, 804 F.2d 506 (8th Cir. 1986), involved a shipper's suit for damages resulting from late delivery, in which the shipper contended that the transaction was induced by the carrier's guarantee of delivery within a time certain. Paulson lost because Greyhound's published tariff forebade time-of-delivery guarantees. Zachry-Dillingham has no quarrel with the inapposite holdings for which those decisions are cited by APL.

offered by APL precludes application of state consumer law to protect against misrepresentations that existing tariffs would be amended and to remedy the effect of being bound to a shipping commitment that, but for that kind of fraudulent conduct, would not have occurred. It is one thing to say that a filed tariff sets the exclusive shipping charge, but quite another to say that the exclusivity of tariff charges can be used successfully as both a sword of fraud and a shield from responsibility. This is the precise reasoning of the Texas court of appeals against whom the writ is sought.

B. *After analyzing the criteria for determining federal preemption, the lower court correctly concluded that Congress did not intend for the Shipping Act's tariff regulation to preempt state law redress for the conduct in question.*

This Court has held that, in the absence of congressional declaration of preemptive intent, state law is preempted only when Congress indicates an intent to occupy a given field or when state law actually conflicts with federal law. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 78 L. Ed. 2d 443, 452 (1984). Preemption to the extent of conflict arises when compliance with both state and federal laws is a "physical impossibility" or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 10 L. Ed. 2d 248, 256-57 (1963). This Court has applied a strong presumption against federal preemption, particularly when the state is exercising its police power through the legislation in question. *See id.* at 256. Because the Texas deceptive trade practice statutes represent an exercise of state police powers, the strong presumption applies in this case. *See Brown v. American Transfer & Storage Co.*,

601 S.W.2d 931, 938 (Tex.), *cert. denied*, 449 U.S. 1015 (1980).[3]

It is undisputed that the Shipping Act does not expressly preempt state law. Moreover, there is no language in the Shipping Act remotely indicative of a congressional intent to prohibit Texas from exercising police power to protect its citizens against the kind of fraud and deception allegedly perpetrated by APL. As the lower court correctly reasoned, the overriding emphasis of the Shipping Act is on the contractual responsibilities and liabilities of carriers and shippers, particularly the relationship between filed tariffs and charges for transporting property and persons by water. Decisions like *Aero Trucking, supra*, may properly rest on Congress' creation of uniform rules to govern the tariff-charge relationship, but the Shipping Act evinces no intent to eliminate state law recourse for fraud of another realm, that is, fraud that does not adversely impact the exclusivity of tariff-filed charges. *See* 46 U.S.C. §§ 801, 812-17. In an analogous setting, the Supreme Court of Texas held that the Carmack Amendment to the Interstate Commerce Act did not preempt the deceptive practice statutes with respect to misrepresentations occurring before formation of the shipping contract. *See Brown v. American Transfer & Storage Co., supra*, at 938.

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[3] The broad purpose of these statutes is to provide consumers with protection from deceptive, false, misleading business practices including unconscionable actions and breach of warranty. *See* Tex. Bus. & Com. Code Ann. § 17.44 (Vernon 1987). In addition, the Texas Legislature sought "to provide consumers [with] a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common-law fraud or breach of warranty suit. (Citations omitted)." *Smith v. Baldwin*, 611 S.W.2d 611, 616 (Tex. 1980). Furthermore, the possibility of additional damages for a knowing violation of the statutes creates an incentive for individual consumers to seek redress for deceptive practices and also acts as a deterrent to such conduct. *See Woods v. Littleton*, 554 S.W.2d 662, 670-71 (Tex. 1977).

Other than imposing penalties for providing discriminatory services at less than the tariff rate, the Shipping Act does not purport to regulate the general liability of a common carrier such as APL. *See* 46 U.S.C. §§ 801, 812, 814-17. There is nothing in the Shipping Act or in the decisions construing it suggesting that uniformity was sought with respect to legal liability for fraud and deceptive practice preliminary to the function of the tariff-charge relationship. *Cf. Brown, supra,* at 938. Unlike the *Aero Trucking* situation, state law liability for the fraudulent and deceptive conduct alleged against APL would not intrude upon any goal or purpose of the Shipping Act. Specifically, if Zachry-Dillingham prevails in its state action, the Shipping Act's tariff-charge relationship would remain inviolate, but protection left to the police powers of the states would be afforded. For those reasons, both the federal district court and the Federal Maritime Commission refused to exercise jurisdiction over this controversy.

Nowhere does Texas remedial law purport to regulate the shipping industry or the rates to be charged for shipping goods. Texas law is implicated in the relationship between a shipper and a carrier only if one of the parties engages in conduct that would be actionable on the part of anyone else similarly situated. Contrary to APL's thinly-veiled assertion on page 12 of its Petition, liability under the statutes would not effectively "require a carrier to charge a rate different from the rate in the published tariff. . . ." The statutes merely prevent deceptive or unconscionable conduct from unjustly enriching a carrier or anyone else. In this respect, the statutes foster, rather than conflict with, the aim of the Shipping Act to:

> enable American carriers and shippers to conduct international ocean commerce transportation in a stable, efficient and competitive manner within a fair trade environment in which malpractices can be found and punished.

H.R. Rep. No. 53, 98th Cong., *reprinted in* 1984 U.S. Code Cong. and Ad. News 183-84. It is thus certainly clear that Texas law sought to be implemented here does not frustrate Congress' purpose in enacting the Shipping Act. It would not be impossible for a carrier to comply with both Texas law and the Shipping Act's tariff-filing system. In this instance, APL could have either refrained from representing that new tariffs would be filed or filed the new tariffs as promised.

APL's position is so grossly inequitable and overreaching that it cannot possibly represent congressional intent. According to APL, the actually filed tariff is the end-all point for any discussion of the legal relationship between a shipper and a carrier. Under its theory, a carrier has carte blanche to misrepresent that a new tariff will be filed to match a rate quotation better than competitors' tariffs. After obtaining business in a fraudulent manner, a carrier is supposedly fully protected by the Shipping Act from state law liability even though it lifted no finger to file the new tariff. In essence, APL argues that Congress has bestowed upon carriers an absolute immunity to fraudulently induce contracts because nothing in the Shipping Act prevents it or punishes for its accomplishment. Contrary to APL's thesis, the Shipping Act does not preempt private remedy for this kind of fraud, and the states may impose liability for it against a carrier just as they can against everyone else. The Texas court of appeals correctly and forcefully rejected APL's "immunity" arguments.

C. *The lower court's holding is not contrary to decisions of this Court.*

APL's "filed rate doctrine" argument is fragmented in parts I and III of the Petition, both of which mention decisions of this Court said to be dispositive on the same subject. In this section of its brief, Zachry-Dillingham will dispel APL's notion that the following decisions of

this Court compel a contrary result: *Keogh v. Chicago and Northwestern Railway Co.*, 260 U.S. 156, 163 (1922); *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 467 U.S. 409, 90 L.Ed.2d 413 (1986); *Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981).

Emphasizing that the Shipping Act was modeled after the Interstate Commerce Act, this Court held that "Congress intended that the two Acts, each in its own field, should have like interpretation, application and effect." *United States Navigation Co. v. Cunard S.S. Co.*, 284 U.S. 474, 76 L. Ed. 408, 412 (1932), *quoted in Inter-Island Steam Navigation Co. v. Hawaii*, 305 U.S. 306, 83 L. Ed. 189, 194 (1938) (Shipping Act did not preempt Hawaiian regulation imposing fee on common carrier by water). On that basis, APL contends in Parts I and III of its Petition that this Court's Interstate Commerce Act decisions in *Keogh v. Chicago and Northwestern Railway Co.*, *supra*, and *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, *supra*, demonstrate federal preemption for the fraud and deception made the basis of Zachry-Dillingham's state action. APL is wrong.

The issues posed in *Square D* were whether *Keogh* precluded anti-trust penalty damages and, if so, whether the preclusion should remain viable. *Id.* at 420. In answering affirmative to both questions, the Court characterized *Keogh* as establishing an anti-trust no-injury rule based on the Interstate Commerce Commission's approval of the tariffs in question, rather than a rule of preemptive immunity from federal anti-trust laws. *See id.* at 422, 425. In *Square D*, the Court retained the *Keogh* rule because Congress had reenacted the applicable laws without change subsequent to the *Keogh* interpretation. *Id.* at 425. Recognizing the narrow application of the *Keogh* rule, the court impliedly reaffirmed *Carnation Co. v. Pacific Westbound Conference*, 383 U.S.

213, 15 L.Ed.2d 709 (1966), noting that, in the absence of Commission rate approval, "rate making activities are not immunized from antitrust scrutiny simply because they occur in a regulated industry." *Id.* at 425.

APL couches its argument on the following excerpt from *Keogh*: "the rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." *See* Petition at 5. Aside from the limited imprimatur given *Keogh* in *Square D*, the simple fact of the matter is that Zachry-Dillingham's state court action does not seek to enlarge rights defined by the tariff. Moreover, differences between the Interstate Commerce Act and the Shipping Act make clear that the *Keogh* rationale does not apply here. The Federal Maritime Commission does not establish just and reasonable rates. *See* 46 U.S.C. §§ 815-17. In *Square D*, this Court noted:

> Indeed, the Shipping Act gives the Federal Maritime Commission far more limited authority over rates than the Interstate Commerce Act gives the Interstate Commerce Commission. *See* 760 F.2d, at 1363 ("Although the [Federal Maritime Commission] can and does take effects on competition into account in approving conference agreements under 46 U.S.C. § 814 [46 U.S.C.S. § 814], . . . the Shipping Act does not give the Commission any mandate to regulate *rate* competition and, indeed, the statutory scheme was designed to minimize the role of the FMC in this regard").

Id. at 425 (n.29).

This court's decision in *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co., supra*, involved a tort action for damages caused by cessation of rail service. *See id.* at 264. That common law action was held preempted because not only had the Interstate Commerce Commission approved the cessation, but the ICC had already considered every issue being raised in the state court action. *See id.* at 270-71. Thus, not only was

cessation specifically regulated by federal law, but also it had actually been litigated by a federal administrative agency. *See id.* at 270. Here, there is no such specific regulation, and not only did the Federal Maritime Commission expressly decline to exercise jurisdiction, but the Federal District Judge ruled that Zachry-Dillingham's suit did not belong in federal court.

Arkansas Louisiana Gas Co. v. Hall, supra, is a Federal Energy Regulatory Commission case. In a state breach of contract suit, a seller of gas sought to enforce contractual payment of sums at odds with its own tariffs. This Court held that the state law "breach of contract" action was preempted by the Commission's authority over rates through tariff-filing requirements. That decision does not undermine the validity of the lower court's opinion in the present case, because the lower court similarly ruled that Zachry-Dillingham's breach of contract action was preempted by the Shipping Act.

APL apparently relies on *Hall* because this Court dismissed as a factor the seller's contention that the purchaser's fraudulent failure to disclose other purchases prevented the seller from obtaining a higher permissible rate. Again, difference in the roles of the two Commissions is critical. In *Hall*, this Court rejected the purchaser's non-disclosure as a factor partly because whether the Federal Energy Regulatory Commission would have approved a higher rate was purely a matter of speculation. Important to that decision was the Court's recognition that the Commission had the right to fix rates when new schedules are proposed by the regulated party. *See id.* at 863. There is no comparable provision in the Shipping Act; in fact, the new tariffs promised by APL would have been effective upon filing. Since Zachry-Dillingham's action is based on the regulated party's fraud and deception in not filing new tariffs, the facts are so far removed from those in *Hall* that the fraud question reserved in *Hall* is clearly not presented by this case.

II. Zachry-Dillingham's state action is not preempted by general maritime law.

In the lower courts, APL never identified the manner in which the Texas law in question excessively burdens or irreconcilably conflicts with maritime law. In essence, APL's motion for summary judgment and appellate briefs globally invoked "maritime law" and "admiralty jurisdiction" as creating absolute bars. APL's argument in its Petition is but a shade or phase of the "filed rate doctrine."

APL's position is contrary to decades of Supreme Court decisions. "To claim that all enforced rights to matters maritime are rooted in federal law is a destructive over-simplification of the highly intricate interplay of the States and National Government in their regulation of maritime commerce." *Romero v. International Term. Operating Co.*, 358 U.S. 354, 3 L.Ed.2d 368 (1959). There are very few areas where federal and state regulation overlap more than in maritime matters. States have been permitted to use police powers to enact laws on virtually every aspect of maritime laws. *See id.* at 383.

Accordingly, it is well established that states may enact laws, pursuant to police powers, on a "wide-scope" of maritime matters without impermissibly intruding upon federal regulation of admiralty or maritime matters. *See Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 36 L.Ed.2d 280, 289 (1973); *Romero, supra* at 382. When discussing the narrow preemptive effect of maritime law, Justice Potter Stewart once stated:

> It is unnecessary here to delineate the "wide scope" within which the States may legislate about things maritime. To refute the notion that the high seas are a species of federal enclave, it is sufficient to point out that the Court has found state legislation preempted *only* when the nature of the problem required the application of a uniform rule or when the state law unduly hampered maritime commerce. . . . The Court has never struck down a state law on the

> ground that the States are jurisdictionally incompetent to legislate over matters that occur within the ocean "territory." (Citations omitted) (emphasis by Justice Stewart).

Oil, Chem. & Atomic Workers, Int'l Union v. Mobil Oil Corp., 426 U.S. 407, 48 L.Ed.2d 736, 755 (1976) (Stewart, J. dissenting).

APL's reliance on *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 91 L.Ed.2d 174 (1986) is not at all persuasive. The holding in *Tallentire* was based on detailed expression of congressional intent, contained in the Death on the High Seas Act, to occupy the field of litigation over wrongful death on the high seas. There is nothing comparable in the Shipping Act, and APL points to no other maritime law requiring a "uniform" resolution of this dispute. The question pending in *Chick Kam Choo v. Exxon Corp.*, No. 87-505, appears to involve an obvious clash between a well-defined rule of maritime *forum non conveniens* and a state open-forum statute. *See Chick Kam Choo v. Exxon Corp.*, 817 F.2d 307 (5th Cir.), *cert. granted*, —— U.S. ——, 48 L.Ed.2d 369 (1987). With respect to the present case, there are no laws in conflict.

CONCLUSION

APL's Petition for Writ of Certiorari should be denied. The Texas court of appeals did not err in holding that redress for the conduct in question is not preempted by the Shipping Act or maritime law. The lower court's decision is clearly not contrary to the rulings of this Court.

Respectfully submitted,

Of Counsel:

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APPENDIX A

TEXAS BUSINESS AND COMMERCE CODE

§ 17.46. Deceptive Trade Practices Unlawful

(a) False, misleading, or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful and are subject to action by the consumer protection division under Sections 17.47, 17.58, 17.60, and 17.61 of this code.

(b) Except as provided in Subsection (d) of this section, the term "false, misleading, or deceptive acts or practices" includes, but is not limited to, the following acts: . . .

> (5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not; . . .
>
> (7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; . . .
>
> (9) advertising goods or services with intent not to sell them as advertised; . . .
>
> (11) making false or misleading statements of fact concerning the reasons for, existence of, or amount of price reductions;
>
> (12) representing that an agreement confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law; . . .
>
> (14) misrepresenting the authority of a salesman, representative or agent to negotiate the final terms of a consumer transaction; . . .

(19) representing that a guarantee or warranty confers or involves rights or remedies which it does not have or involve, provided, however, that nothing in this subchapter shall be construed to expand the implied warranty of merchantability as defined in Sections 2.314 through 2.318 of the Business & Commerce Code to involve obligations in excess of those which are appropriate to the goods; . . .

(23) the failure to disclose information concerning goods or services which was known at the time of the transaction if such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer would not have entered had the information been disclosed; . . .

§ 17.50. Relief for Consumers

(a) A consumer may maintain an action where any of the following constitute a producing cause of actual damages:

(1) the use or employment by any person of a false, misleading, or deceptive act or practice that is specifically enumerated in a subdivision of Subsection (b) of Section 17.46 of this subchapter; . . .

(3) any unconscionable action or course of action by any person; . . .

(b) In a suit filed under this section, each consumer who prevails may obtain:

(1) the amount of actual damages found by the trier of fact. In addition the court shall award two times that portion of the actual damages that does not exceed $1,000. If the trier of fact finds that the conduct of the defendant was committed knowingly, the trier of fact may award not more than three times the amount of actual damages in excess of $1,000; . . .

APPENDIX B

FEDERAL MARITIME COMMISSION
P.O. Box 30550
New Orleans, La. 70190

GULF DISTRICT

January 31, 1983

In Reply
Refer To: 73-INC-1-174

Mr. Jim Shaw
WTS of Houston, Inc.
2050 North Loop West, Suite 100
Houston, Texas 77018

Dear Mr. Shaw:

After review of the correspondence you furnished, it appears that the basic dispute between WTS of Houston, Inc. and American President Lines (APL) seems to fall upon a lack of clear communication between the forwarder and carrier.

Inasmuch as we would like to be of assistance in this matter there does not appear to be a violation of the Shipping Act, 1916 on which a formal complaint might be successfully lodged. Nor does there appear to be recourse available under CFR 502.91 *et seq.* for special docket application since no error or inadvertence in filing appears to have occurred and APL is not willing to enter such a proceeding at this time. The only recourse apparently available is through civil suit for resolution of this dispute.

We regret we cannot be of further assistance in this matter, however if you have any further questions, please contact Gulf District Investigator Jules Johnson at (504) 589-6662.

Sincerely,

GEORGE B. HARRY
Director, Gulf District